FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. "The legislative history of the fee waiver provision reveals that it was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,' in particular those from journalists, scholars and nonprofit public interest groups." *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); S. COMM. ON THE JUDICIARY, AMENDING the FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).[3] "This is in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities which have been used by… agencies to deny waivers.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987) (quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

Requester's ability — as well as many nonprofit organizations, educational institutions and news media that will benefit from disclosure — to utilize FOIA depends on its ability to obtain fee waivers. For this reason, "Congress explicitly recognized the importance and the

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[3] This was grounded in the recognition that the two plaintiffs in that merged appeal were, like requester, public interest non-profits that "rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." *Better Gov't v. State*. They therefore, like requester, "routinely make FOIA requests that potentially would not be made absent a fee waiver provision", requiring the court to consider the "Congressional determination that such constraints should not impede the access to information for appellants such as these." *Id.*

difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the 'public benefit' test for FOIA fee waivers", a waiver provision added to FOIA in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests including, most importantly for our purposes, nonprofit public interest groups. *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986). Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as '"toll gates" on the public access road to information. *Id.*

As the *Better Government* court also recognized, public interest groups employ FOIA for activities "essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." *Id.* Congress enacted FOIA clearly intending that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." *Ettlinger v. F.B.I.*, 596 F. Supp. 867, 872 (D. Mass. 1984), citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Id.* at 874.

Therefore, "insofar as... [agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information." *Better*

Gov't v. State (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that "'chill' the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage." *Id.* As such, the Agency implementing regulations may not facially or in practice interpret FOIA's fee waiver provision in a way creating a fee barrier for requester.

Courts have noted FOIA's legislative history to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286 (9th Cir. 1987).

This information request meets that description. The individual whose correspondence we seek previously instigated a subpoena campaign against more than 100 private groups and individuals designed to chill political speech in opposition to the climate agenda, and now holds a senior position at EPA.

The requested records will provide the public with original source knowledge concerning the above-described issue. The requested records thus clearly concern the operations and activities of government.

1) **The subject matter of the requested records specifically concerns identifiable operations or activities of the government**. Potentially responsive records will provide important insights into the issue as discussed in this request.

The Department of Justice Freedom of Information Act Guide concedes that this threshold is easily met. There can be no question that it is met here and, for that

potentially responsive records unquestionably reflect "identifiable operations or activities of the government" with a connection that is direct and clear, not remote.

2) **Requester intends to broadly disseminate responsive information**. As demonstrated herein requester has both the intent and the ability to convey any information obtained through this request to the public. IER regularly publishes works and it and its experts are regularly cited in newspapers and trade and political publications, and appear on radio and television to discuss their work, and requester intends to broadly disseminate public information obtained under this FOIA as it has other information relevant to its mission and work.

3) **Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request.** Requester intends to broadly disseminate responsive information. The requested records have an informative value and are "likely to contribute to an understanding of Federal government operations or activities," and as noted above this issue is of significant and increasing public interest.

However, **the Department of Justice's Freedom of Information Act Guide makes it clear that, in the DoJ's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain**. It cannot be denied that, to the extent the requested information is available to any parties, it appears likely that this is information held only by the Agency, is therefore clear that the requested records are "likely to contribute" to an understanding of your Agency's decisions because they are not otherwise accessible other than through a FOIA request.

Thus, disclosure and dissemination of this information will facilitate meaningful public participation in the policy debate, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of your Agency's dealings with interested parties outside the Agency and interested -- but not formally involved -- employees who may nonetheless be having an impact on the federal permitting process, state and local processes and/or activism on the issue.

4) **The disclosure will contribute to the understanding of the public at large, as opposed to merely that of the requester or a narrow segment of interested persons.** The media coverage of the issue relevant to the instant request, cited above, demonstrate that this is an issue of interest to the general public and not some small subset.

IER is dedicated to and has a documented record of promoting the public interest, advocating sensible policies to make energy more abundant, affordable and reliable, broadly disseminating information relevant to the policy issues on which its experts work.

With a demonstrated interest and record in the relevant policy debates and expertise in the subject of energy- and environment-related regulatory policies, IER unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the "public at-large."

5) **The disclosure will contribute "significantly" to public understanding of government operations or activities**. *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is "likely to contribute" to an understanding of specific government operations or activities*.

Only by the Agency releasing this information will public interest groups such as requester, other media, and the public at large see these terms first-hand and draw their own

conclusions concerning a senior Agency official's involvement in climate advocacy as already described. Because IER has no commercial interests of any kind, disclosure can only result in serving the needs of the public interest.

As such, requester has stated "with reasonable specificity that its request pertains to operations of the government," and that it intends to broadly disseminate responsive records. "[T]he informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006). We note that federal agencies regularly waive fees for substantial productions arising from requests expressing the same intention using the same language as used in the instant request.

The key to "media" fee waiver is whether a group publishes, as IER most surely does. *See supra.* In *National Security Archive v. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the D.C. Circuit wrote:

> The relevant legislative history is simple to state: because one of the purposes of FIRA is to encourage the dissemination of information in Government files, as Senator Leahy (a sponsor) said: "It is critical that the phrase `representative of the news media' be broadly interpreted if the act is to work as expected.... If fact, *any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a `representative of the news media.'"*

Id. at 1385-86 (emphasis in original).

As the court in *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) noted, this test is met not only by outlets in the business of publishing such as newspapers; instead, citing to the *National Security Archives* court, it noted one key fact is determinative, the "*plan to act, in essence, as a publisher*, both in print and other media."

EPIC v. DOD, 241 F.Supp.2d at 10 (*emphases* added). "In short, the court of appeals in National Security Archive held that '[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.'" *Id.* at 11. *See also, Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989).

For these reasons, requester qualifies as a "representative[] of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See EPIC v. Dep't of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, particularly after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format, so there should be no costs.

Conclusion

We expect the Agency to release within the statutory period of time all responsive records, withholding only segregable portions of any that might contain properly exempt information, and to provide information that may be withheld under FOIA's discretionary

provisions, and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009)("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears.").

We expect all aspects of this request including the search for responsive records be processed free from conflict of interest.

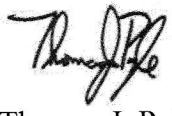
We request the Agency to provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i); see also *CREW v. FEC*. The Agency must at least inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires the Agency to immediately notify IER with a particularized and substantive determination, and of its determination and its reasoning, as well as IER's right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013). *See also*, *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14

(D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records, such that the Agency furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform the Agency of our intention to protect our appellate rights on this matter at the earliest date should the Agency not comply with FOIA per, *e.g.*, *CREW v. Fed. Election Comm'n*, 711 F.3d 180 (D.C. Cir. 2013).

If you have any questions please do not hesitate to contact me. I look forward to your timely response.

Sincerely,



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